tator meant to divide his property among the branches of his family rather than among all the individuals composing them.[12]

In the recent case of *Matter of Union Trust Co.* (N. Y. App. Div., 1st Dept. 1915) 156 N. Y. Supp. 32,[13] the will provided that, under the circumstances, which actually occurred, the share of the testator's property held in trust for one of his daughters for life, should at her death, pass "in equal portions" to the "issue" of the other. The Appellate Division agreed with the Surrogate in holding that "issue" was equivalent to descendants, but differed from him in concluding that the whole scheme of the will showed that the testator intended equality of distribution among his grandchildren, and that the division among the issue must therefore be *per stirpes* and not *per capita*. Whether the particular document under consideration afforded that "very faint glimpse of a contrary intent" which is sufficient to take it out of the operation of the general rule in New York, is a question upon which there is room for a reasonable difference of opinion, but the decision may be taken as indicating the tendency of the courts to grasp any opportunity to substitute what they believe to be the fairer method of distribution usually intended by the testator, for the *per capita* division required by the strict rule.[14]

INSANITY AS A DEFENCE TO A CRIMINAL CHARGE.—The history of the defence of insanity in the criminal law, from the time it was first recognized that an insane person was not punishable, may be briefly shown by noting the various so-called tests of insanity that have been applied by the courts of law in England and in this country. In early times there was no acquittal; but a special verdict declared the prisoner's madness and he was pardoned by the king.[1] Later, the accused's responsibility was said to depend upon whether he was totally deprived of his understanding and memory and knew what he was doing "no more than an infant, than a brute, or a wild beast".[2] In 1812, in the answers given by the judges to the House of Lords in *M'Naghten's Case*,[3] were suggested those instructions which have supplied the majority of modern courts with rules of law applicable to the defence of insanity.[4] These have been resolved into what is to-day known

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[12]Dexter *v.* Inches, *supra*; Coates *v.* Burton, *supra.*

[13]Modifying decree of the Surrogate in Matter of Union Trust Co. (N. Y. 1915) 89 Misc. 69, 151 N. Y. Supp. 246.

[14]The opinion in the principal case admits that it may be going further than any reported decision, but expresses dissatisfaction with the practical results of the ordinary rule.

[1]2 Stephen, History of Criminal Law, 151; 2 Pollock & Maitland, History of English Law, 480.

[2]Rex *v.* Arnold (1724) 16 How. St. Tr. 765.

[3]M'Naghten's Case (1843) 10 Cl. & F. 200.

[4]In Hadfield's Trial (1800) 27 How. St. Tr. 1281, a theory of delusional insanity was approved and was later elaborated upon in M'Naghten's Case, *supra.* A crime, in consequence of some delusion, was excused only if it would be justified if the delusion were actually true. This theory finds support among text writers and is applied with modifications by many modern courts. See Browne, Medical Jurisprudence, § 8; Davis *v.* State (1902) 44 Fla. 32, 32 So. 822; Merritt *v.* State (1898) 39 Tex. Cr. 70, 45 S. W. 21; Thurman *v.* State (1891) 32 Neb. 224, 49 N. W. 338. In practically every case, however, the right and wrong test alone as applied to-day would cover the facts of such delusional or partial insanity.

as the right and wrong test,[5] which, by the weight of authority, is generally construed to mean that the accused is liable, if at the time of the commission of the crime and with reference to the act itself, he knew or had the capacity to know right from wrong[6], or, in different phrasing, if he knew at the time, the nature, quality, and character of the act and knew that it was wrong.[7] In some states the penal code has defined insanity in practically these words.[8]

A number of text writers and medical experts, however, have regarded this test as quite inadequate and even in contradiction of certain characteristics of the disease.[9] Consequently, some courts have adopted a complement or alternative to the right and wrong test, by which a person is excused from criminal liability if, by reason of a mental disease, he was irresistibly driven to commit the crime, although he may have realized that the act was wrong.[10] This inability to refrain, accompanied with the knowledge that the act is wrong, is recognized as a frequent result of insanity.[11] The objections to admitting this doctrine are purely practical. It is argued that to increase the opportunity for pleading insanity, is to open the door for its grave abuse. Certainly some workable test or rule of law, which the jury may readily apply, should be established.[12] If, then, we exclude the

[5]The capacity to distinguish right from wrong, and by right from wrong was meant good as contrasted with evil, was suggested in determining the sanity of the accused in Bellingham's Case (1812) 1 Collinson, Lunacy, 636. Mention was made of it in 1724 in Rex *v.* Arnold, *supra*, 764, 765; but it was evidently not generally recognized or adopted until much later. At another time it was suggested that the prisoner was sane if his intellect was that of a boy of fourteen years. 2 Stephen, History of Criminal Law, 150, 151.

[6]Alberty *v.* State (1914) 10 Okla. Cr. 616, 140 Pac. 1025; Bond *v.* State (1913) 129 Tenn. 75, 165 S. W. 229; Smith *v.* State (1909) 95 Miss. 786. 49 So. 945; Oborn *v.* State (1910) 143 Wis. 249, 126 N. W. 737; State *v.* Knight (1901) 95 Me. 467, 50 Atl. 276.

[7]Schwartz *v.* State (1902) 65 Neb. 196, 91 N. W. 190; People *v.* Hubert (1897) 119 Cal. 216, 51 Pac. 329; see Genz *v.* State (1896) 59 N. J. L. 488, 37 Atl. 69.

[8]People *v.* Silverman (1905) 181 N. Y. 235, 73 N. E. 980; State *v.* Scott (1889) 41 Minn. 365, 43 N. W. 62.

[9]3 Witthaus & Becker, Medical Jurisprudence (2nd ed.) 432, 448, 449; Parsons *v.* State (1886) 81 Ala. 577, 2 So. 854; see Lee *v.* State (1902) 116 Ga. 563, 42 S. E. 759.

[10]Parsons *v.* State, *supra*; Commonwealth *v.* Cooper (1914) 219 Mass. 1, 106 N. E. 545; Banks *v.* Commonwealth (1911) 145 Ky. 800, 141 S. W. 380; Allams *v.* State (1905) 123 Ga. 500, 51 S. E. 506; State *v.* Keerl (1903) 29 Mont. 508, 75 Pac. 362. It must be understood that these cases do not admit the defence of what has been called moral or emotional insanity. But see Smith *v.* Commonwealth (1864) 62 Ky. 224 and Scott *v.* Commonwealth (1863) 61 Ky. 227.

[11]See note 9.

[12]Browne, Medical Jurisprudence, §§ 13-15. In some instances the necessity for any such test has been denied and the question of insanity has been left solely to the jury with general instructions appropriate to the facts. State *v.* Jones (1871) 50 N. H. 369; see Plake *v.* State (1889) 121 Ind. 433, 23 N. E. 273. At the other extreme, one writer contends that the volition as well as the cognition of the accused is included in the right and wrong test and that, in effect at least, the question of irresistible impulse is considered, or should be considered by the jury, where such instructions are given. Browne, Medical Jurisprudence, §§ 13-15.

irresistible impulse theory, it will be seen that, in effect, the courts are applying merely a test of responsibility or what may be termed legal insanity, which admittedly fails to include many forms of mental disease if judged by medical standards.[13]

In any jurisdiction where the right and wrong test is followed, the further question may arise as to the true meaning of the word wrong. This question seems never to have been squarely raised before the recent case of *People* v. *Schmidt* (N. Y. Ct. of App. 1915) 54 N. Y. L. J. 907, where the court held an instruction treating the word as meaning legal wrong exclusively to be erroneous. Many cases, to provide for all exigencies, have elaborated upon the test by interpreting wrong to mean both legal and moral,[14] or either legal or moral.[15] The ambiguity that might result in applying such interpretations is avoided by the decision in the principal case. With wrong meaning moral wrong, that situation is met where "defect of reason"[16] results in the belief that the crime is morally right, although it was known to be contrary to the law of the land. On the other hand, it is obvious that the anarchist who kills in accordance with his moral code is liable, for there is no question then of defect of reason or mental disease.[17]

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[13]Browne, Medical Jurisprudence, § 11; 3 Witthaus & Becker, Medical Jurisprudence, (2nd ed.) 432.

[14]State *v.* Porter (1908) 213 Mo. 43, 111 S. W. 529; People *v.* Willard (1907) 150 Cal. 543, 89 Pac. 124; Blackburn *v.* State (1872) 23 Oh. St. 146, 164.

[15]State *v.* Jackson (1910) 87 S. C. 407, 69 S. E. 883.

[16]N. Y. Penal Law, § 1120.

[17]See People *v.* Carlin (1909) 194 N. Y. 448, 87 N. E. 805.